Filed 3/30/15 In re E.H. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re N.H., a Person Coming Under the Juvenile Court Law.	
CONTRA COSTA COUNTY CHILDREN & FAMILY SERVICES BUREAU, Plaintiff and Respondent, v. E.T. and J.H., Defendants and Appellants.	A142901 (Contra Costa County Super. Ct. No. JI300836)

E.T. (Mother), mother of three-year-old N.H., appeals from the juvenile court's orders denying her petition for modification under Welfare and Institutions Code[1] section 388 (388 petition) and terminating her parental rights to N.H. She contends the juvenile court erred in: (1) denying her 388 petition because "[t]he evidence showed a substantial change of circumstances" and because it was in N.H.'s best interests to continue his relationship with Mother; and (2) terminating her parental rights to N.H. because the beneficial relationship exception applied.

J.H., biological father of N.H., also appeals and contends the juvenile court: (1) erred in denying him presumed father status because he had received N.H. into his

[1]All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

home and had publicly acknowledged his paternity; and (2) erred in terminating parental rights because it failed to make the requisite finding that he was unfit as a parent, and the evidence was insufficient to support such a finding. We reject all of the contentions and affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

Prior Opinion[2]

On July 15, 2013, the Contra Costa Children & Family Services Bureau (the Bureau) filed a dependency petition on behalf of then-one-year-old N.H., who was born with VACTERL[3] syndrome and was later diagnosed with cerebral palsy. According to the detention/jurisdiction report, on July 9, 2013, Mother and N.H. had been visiting Mother's boyfriend J.H., who was schizophrenic, unemployed, was taking Haloperidol and Aderall, and was a methamphetamine dealer. When N.H. awoke from his nap that day, his eyes were rolling back in his head. Mother took N.H. to the hospital, where he tested positive for methamphetamine. Later, a red pill was found in the crib where N.H. had been sleeping on July 9. A forensic physician opined that N.H., who was unable to crawl or roll over, must have inhaled the methamphetamine and absorbed it through his skin. Mother denied using illegal drugs and said she did not know how N.H. had been exposed to methamphetamine. J.H. also denied using illegal drugs. N.H. was placed in a foster home on July 24, 2013, and the juvenile court sustained the petition.

J.H. believed he was N.H.'s father, but Mother said she was not sure he was. The detention/jurisdiction report listed J.H. and another man, R.H., as N.H.'s alleged fathers;

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[2]Mother previously filed a petition for extraordinary writ challenging the juvenile court's order terminating reunification services and setting a permanency hearing under section 366.26 (366.26 hearing). We denied the petition in an unpublished opinion, *E.T. v. Superior Court* (July 30, 2014, A141726) [nonpub. opn.]. We incorporate our prior opinion here and shall provide only a brief summary of the events leading up to the writ petition.

[3]VACTERL is a non-random occurrence of certain congenital anomalies and is an acronym for verbral anomalies, anal atresia, cardiac defects, tracheoesophageal fistula and/or esophageal atresia.

N.H. and R.H. shared the same last name. J.H. was provided notice of the detention hearing but did not appear. R.H. was adjudicated to be the father on September 11, 2013.

On October 7, 2013, J.H. filed a statement regarding paternity consenting to DNA testing and asking the juvenile court to appoint counsel for him. He asserted N.H. had lived with him for three months, that he had provided for him, and that he had acknowledged him as his child to four individuals. The court appointed counsel for J.H. and ordered paternity testing for him.

According to a disposition report, Mother was having regular bi-monthly supervised visits with N.H. and spoke to him on the telephone daily. She was no longer with J.H. She admitted she smoked marijuana. At an October 21, 2013 disposition hearing, the juvenile court declared N.H. a dependent child and ordered reunification services for Mother. The court increased her visits to one hourly visit per week. J.H. did not appear at the hearing, and the court continued the matter to December 19, 2013, for purposes of receiving the paternity test results. On December 19, 2013, the paternity test had not yet been completed and the matter was continued to February 6, 2014.

Before the February 6, 2014 hearing, the Bureau submitted the results of the paternity test, which showed J.H. was N.H.'s biological father. J.H.'s attorney appeared at the hearing but J.H. did not appear. The juvenile court did not order any reunification services for J.H. because he had not appeared in court to address his status. The court continued the matter to February 27, 2014 and ordered the Bureau to search for J.H. J.H.'s attorney appeared at the February 27, 2014 hearing, but J.H. once again did not appear. The court continued the matter to April 7, 2014 and instructed counsel to contact J.H.

J.H. appeared in court on the morning of April 7, 2014 but did not return when the matter was called on the record in the afternoon. The juvenile court continued the matter to April 10, 2014 and denied J.H.'s attorney's request for J.H.'s status to be raised to biological father, and for J.H. to be granted visitation with N.H.

On April 10, 2014, J.H. appeared at the hearing and was confirmed to be the biological father of N.H. The juvenile court granted J.H. one, one-hour supervised visit

per week, dismissed R.H. from the proceedings, and scheduled a contested six-month review hearing for April 21, 2014. J.H. asked the court to grant him presumed father status but the court stated it would address the issue at the April 21, 2014 hearing.

According to the six-month review report, Mother had eight unexcused no shows to random drug testing. She had 14 negative tests and four positive tests. She was diagnosed with adjustment disorder with mixed anxiety and depressed mood. She missed approximately half of her therapy sessions. She had no stable housing. She had declined to enroll in a residential program on the ground that she wanted to maintain her privacy. The Bureau had reached out to J.H. by telephone and by mail to schedule his visits with N.H., but J.H. had not responded to the communications.

At the April 21, 2014 six-month review hearing, the juvenile court found that reasonable reunification services had been provided. It terminated services and scheduled a section 366.26 hearing for August 7, 2014, stating that while Mother loved N.H. and visited him regularly, she was also "in denial about why her child is a dependent of this court." The court noted she had "not demonstrated the capacity and ability to complete the objectives of a treatment plan and provide for the child's safety, protection, physical and emotional health, as well as his enormous and extensive special needs." J.H. did not appear at the hearing. In light of J.H.'s failure to engage in visitation, the court reduced his visits to a minimum of one, one-hour visit per month.

On June 5, 2014, Mother filed a timely petition for extraordinary writ in this court challenging the juvenile court's order terminating reunifications services and setting a 366.26 hearing. She requested an additional six months of services. We denied the petition. J.H. was advised of his right to file a petition but did not do so.

Current Appeal

On July 21, 2014, Mother filed a 388 petition requesting reinstatement of reunification services. She asserted circumstances had changed because she had completed a substance abuse treatment program, was in therapy, and was taking medication for her mental health issues. She attached letters of support from her program, certificates of completion, and a prescription receipt.

In preparation for a combined hearing on the 388 petition and the 366.26 hearing, the Bureau filed a social study report recommending that the 388 petition be denied and that N.H. be freed for adoption. At the time of the report, N.H. was almost two and one-half years old and had been in foster care for over a year. He was a special needs child with multiple medical issues and developmental delays. He was medically stable and had not even had a cold while in foster care. He was a happy child and was becoming more independent with age. He "glow[ed]" when his caretakers spoke to him, and the caretakers were committed to adopting him.

Mother had maintained all of her scheduled visits with N.H., and her visits were described as loving and caring. Mother expressed disappointment in N.H.'s continued developmental delays and it was reported from the most recent visit that she was unhappy he did not just sit in her lap during the visit. She did not seem to understand that N.H. was becoming more independent and was no longer a baby. J.H. had still not contacted the Bureau to arrange visitation.

At the August 7, 2014 combined hearing, Mother testified in support of her 388 petition, stating she had participated in a substance abuse program, was attending therapy sessions and classes, and had been taking medication for depression. She did not believe she had a substance abuse problem and stated she was "blessed with a non-addictive personality. Nothing is wrong with me." She did not believe she needed a psychological evaluation even though a therapist had recommended it. She testified regarding her visits with N.H. and stated she did not understand why a long drive for N.H. to attend visits—from Sacramento to San Francisco—would be difficult for him. Mother said she was responsible for the dependency case because "[N.H.] is my child."

The juvenile court denied the 388 petition, finding Mother had failed to make a showing as to either of the two prongs—changed circumstances and best interests of the child. The court noted that successful completion of services requires more than just completing tasks, and that while Mother participated in services, she lacked insight as to why she was involved in the programs. The court stated, "And I believe she's on a journey of change, but I don't believe there is sufficient change for the Court to reverse

course at this stage in these proceedings . . . ." The court also determined that N.H.'s best interest demanded that he be allowed to proceed with permanence with his foster/adopt family.

At the conclusion of the 388 petition, the juvenile court proceeded to hear the 366.26 hearing. The court offered—and Mother accepted—that the testimony she gave in support of her 388 petition would be considered evidence for the 366.26 hearing. Mother's counsel argued that Mother had maintained a sufficient relationship with N.H. to establish the beneficial relationship exception to adoption.

J.H., who appeared at the hearing but presented no evidence, requested clarification as to his current status. The juvenile court informed him that his status remained as that of a biological father. Thereafter, J.H. requested that his status be raised to that of a presumed father but offered no information or evidence. The Bureau opposed J.H.'s request on the ground that there was insufficient evidence to raise his status. N.H.'s counsel also opposed the request, noting that J.H. had failed to engage in any visits with N.H. The court denied J.H.'s request, stating, "I see no legal basis to raise Mr. [H.]'s status today to that of presumed."

Following further argument, the juvenile court found the beneficial relationship exception to termination of parental rights did not apply. The court stated it was "not [] convinced that [N.H.] gets the same benefit of those interactions [at the visits] with Mom that she gets from him." "This child has exceptional and extraordinary needs and needs that I don't believe mother is able to meet." The court further found that N.H. was adoptable, and terminated parental rights.

DISCUSSION

A. Mother's Contentions

1. 388 Petition

Mother contends the juvenile court erred in denying her 388 petition because "[t]he evidence showed a substantial change of circumstances" and because it was in N.H.'s best interests to continue his relationship with Mother. We reject the contention.

After termination of reunification services, the focus in dependency proceedings shifts from the parent's custodial interest to the child's need for permanency and stability. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) "It is presumed, at that point, that continued care is in the best interest of the child. The parent, however, may rebut that presumption by showing that circumstances have changed that would warrant further consideration of reunification." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) A juvenile court order may be modified under section 388 if the party seeking the modification can establish a genuine change of circumstances, and also prove the undoing of the prior order is in the best interest of the child. (*In re Aaron R.* (2005) 130 Cal.App.4th 697, 705–706.) Whether a prior order should be modified rests within the discretion of the juvenile court, and its determination will not be disturbed on appeal absent a clear established abuse of discretion. (*In re Stephanie M., supra,* 7 Cal.4th at p. 318.) "The denial of a section 388 motion rarely merits reversal as an abuse of discretion." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 522.)

Here, although Mother made some progress by participating in services, she appeared to lack insight as to why those services were necessary, why the dependency was established, and why N.H. had to be removed from her care. Despite having had multiple positive drugs results and having gone through a substance abuse program, she denied she had any substance abuse issues, said she was "blessed" with a "non-addictive personality," and believed there was "[n]othing" "wrong with [her]." She denied she needed a psychological evaluation, even though her therapist had recommended it. At best, Mother's participation in services showed that circumstances were *changing*, not that they had changed. (See *In re Casey D.* (1999) 70 Cal.App.4th 38, 49 [a parent must show that circumstances have "changed," not merely that they are "changing"].)

Further, Mother failed to show that an order awarding her additional reunification services would be in N.H.'s best interest. (*In re Kimberly F., supra,* 56 Cal.App.4th at p. 529 ["It is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child"].) The court in *In re Kimberly F.* provided a non-inclusive

list of factors to be considered in determining whether to grant a 388 petition: (1) the seriousness of the problem which led to the dependency and the reason for any continuation of the problem; (2) the strength of relative bonds between the dependent child to both parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been. (56 Cal.App.4th at pp. 530–532.)

Here, Mother's inability to keep N.H. safe led to the filing of the dependency action. She made some progress in her case plan, but she did not appear to fully understand the need for the dependency. Although she visited N.H. regularly and their visits were described as loving and caring, she made comments tending to show that she did not understand N.H.'s needs. She expressed disappointment in N.H.'s continued developmental delays and did not seem to understand that he was no longer a baby. In contrast, N.H.'s foster/adopt family was meeting N.H.'s needs, and he had been medically stable while in their care. He had been living in the home for over one year at the time of the 388 petition/366.26 hearing, and he "glow[ed]" when the caretakers spoke to him. The caretakers were committed to adopting him. Under these circumstances, and in light of N.H.'s need for stability and permanence, it was not an abuse of discretion for the juvenile court to determine that providing Mother with additional reunification services was not in N.H.'s best interest.

2. Beneficial Relationship Exception

Mother contends the juvenile court erred in terminating her parental rights to N.H. because the beneficial relationship exception to termination of parental rights applied. We disagree.

"At a permanency planning hearing, the court may order one of three alternatives: adoption, guardianship or long-term foster care. [Citation.] If the dependent child is adoptable, there is a strong preference for adoption over the alternative permanency plans." (*In re S.B.* (2008) 164 Cal.App.4th 289, 296–297.) If the court finds by clear and convincing evidence that a child is adoptable, it must terminate parental rights unless it "finds a compelling reason for determining that termination would be detrimental to

the child [because] . . . [¶] . . . [t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) The "benefit" necessary to trigger the parent-child exception to adoption has been interpreted to mean that, ". . . the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) "If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid.*)

There is a split of authority concerning the appropriate standard for reviewing a ruling that relates to the applicability of a statutory exception to the termination of parental rights at a section 366.26 hearing. (*In re K.P.* (2012) 203 Cal.App.4th 614, 621–622 [abuse of discretion]; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576 [substantial evidence].) The "practical difference between the two standards of review are not significant," and a reviewing court should not interfere unless the facts when viewed in the light most favorable to the judgment are such that no reasonable judge could have made the challenged action. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) Under either standard of review, the juvenile court in this case did not err.

Although Mother visited N.H. consistently and the visits were described as loving and caring, there was very little other evidence presented to show they shared a beneficial parent-child bond. N.H. had been removed from Mother's care when he was only one year old, and he had lived with his foster/adopt family for over one year. The foster/adopt family had been meeting N.H.'s needs and were the primary caretakers in his life. Mother did not appear to understand N.H.'s development or his needs, as she was frustrated about his continued developmental delays and was disappointed that he did not spend the entire visit just sitting on her lap. While Mother loved N.H., the juvenile court was "not convinced that [N.H.] gets the same benefit of those interactions [at the visits] with Mom that she gets from him." The facts of this case fall short from demonstrating

that Mother's relationship with N.H. was so strong as to outweigh the stability and permanence he would gain from adoption.[4]

B. J.H.'s Appeal

1. Presumed Status

J.H. contends the juvenile court erred in denying him presumed father status because he had received N.H. into his home and had publicly acknowledged his paternity. We disagree.

California law recognizes three types of fathers—presumed, natural, and alleged. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 448.)[5] An alleged father is a man who may be the father, but has not yet established himself as either the biological or presumed father of a child. (*Id.* at 449.) A biological or natural father is one whose biological paternity has been established, but who has not achieved presumed father status. (*In re T.G.* (2013) 215 Cal.App.4th 1, 5.) Only a presumed father is a "parent" for purposes of section 361.5 and is entitled to receive reunification services. (*In re Zacharia D.*, *supra*, 6 Cal.4th at pp. 448, 451.)

There are several ways in which a person may show he is qualified as a presumed father, e.g., by marrying or attempting to marry the child's mother or by publicly acknowledging paternity and receiving the child into his home. (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 802–803; Fam. Code, § 7611, subds. (b), (d).) Being a biological

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[4]Mother states in the introduction section of her opening brief that there was "insufficient clear and convincing evidence [N.H.] would be adopted." However, she presents no legal argument or authority in support of this statement. We therefore decline to address the issue. (*Berger v. California Ins. Guarantee Ass'n* (2005) 128 Cal.App.4th 989, 1007 [failure to present coherent argument or cite any authority in support of a contention constitutes a waiver of the issue on appeal].)

[5]California dependency law also acknowledges what is known as the *Kelsey S.* father—a biological father who comes forward early in the dependency case and displays a full commitment to the child. (*In re A.S.* (2009) 180 Cal.App.4th 351, 362, citing *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 849 [must promptly step forward to assume full parental responsibility unless thwarted by a third party, and not just seek to block the adoption.]) J.H. does not assert he was a *Kelsey S.* father, and there is insufficient evidence in the record to support a finding that he was.

father does not, in and of itself, qualify a man for presumed father status; presumed father status is based on the familial relationship between the man and child, rather than any biological connection. (*In re T.R.* (2005) 132 Cal.App.4th 1202, 1209–1210.) A juvenile court does not err by terminating a biological father's parental rights when he has had the opportunity to show presumed father status and has not done so. (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 811.) The person seeking presumed father status bears the burden of proof to establish a claim of presumed father by preponderance of the evidence. (*In re T.R.*, *supra*, 132 Cal.App.4th at p. 1210.)

Here, J.H. filed paternity papers in October 2013 asserting he had lived with N.H. for three months, had provided for him, and had told four people that he was the father. However, despite having been provided with notice of the proceedings from the beginning of the dependency case, he failed to appear in court multiple times. He delayed in obtaining a paternity test and did not seek to establish himself as the presumed father even after there was an adjudication that another man was the father of N.H. His biological connection to N.H. was finally established in February 2014, but he then disappeared for a few months, missing out on opportunities to elevate his status and participate in the dependency action. When he reappeared in court in April 2014, he asked to be made the biological father—not the presumed father—and to be granted visitation with N.H. When the court granted him visits, he failed to even respond to the Bureau's efforts to arrange for the visits. He also failed to appear at the hearing that ended the reunification period and set N.H. upon a path of permanency planning, and he did not seek redress from those orders. Under the facts of this case, the court did not err in denying presumed father status to J.H.

2. Unfitness Finding

J.H. contends the juvenile court erred in terminating parental rights because it failed to make the requisite finding that he was unfit as a parent. J.H. also asserts the evidence was insufficient to support any implied finding of unfitness.

Even assuming a finding of unfitness was required, and also assuming J.H. did not forfeit the claim by failing to raise it below, we conclude the contention fails on the

merits because there was substantial evidence to support an unfitness finding. (*In re A.S.*, *supra*, 180 Cal.App.4th at p. 362 [unfitness and detriment findings may be implicit].) Here, as noted, J.H. failed to appear for significant periods of the case, his whereabouts were unknown for a few months, and he delayed in seeking biological father or presumed father status. He made no arrangements to visit N.H., and there was no evidence he had seen him at all since the beginning of the dependency proceedings. He presented no argument or evidence at any of the hearings to show he was capable of providing for N.H. as a parent. A father's persistent avoidance of responsibility, failure to seek any relief in the juvenile court, and lack of involvement in the child's life for an extended period may constitute substantial evidence that he is unfit as a parent. (*In re P.A.* (2007) 155 Cal.App.4th 1197, 1208–1212.) There was more than enough evidence in this record to support an unfitness finding.

DISPOSITION

The juvenile court's orders denying Mother's 388 petition and terminating parental rights are affirmed.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Siggins, J.